

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

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FILE

OFFICE OF
MANAGING DIRECTOR

Aaron P. Shainis, Esq.
Shainis & Peltzman, Chartered
Suite 240
1850 M Street, N.W.
Washington, D.C. 20036

Re: Hispanic Keys Broadcasting Corporation.
Request for Waiver of FY 2003 Regulatory Fee
Fee Control No. 00000RROG-04-035

Dear Mr. Shainis:

This is in response to your request filed with the Commission on February 9, 2004, on behalf of Hispanic Keys Broadcasting Corporation (Hispanic Keys), that the Commission's Office of Managing Director reconsider its decision denying Hispanic Keys' request for deferral and waiver of the fiscal year (FY) 2003 regulatory fees for Stations WVIB(TV) (\$43,225.00), WVEB-CA (\$365.00), and WMV-848 (\$10.00), on the grounds of financial hardship. See Letter from Mark A. Reger, Chief Financial Officer, Office of Managing Director, to Aaron P. Shainis, Esq. (dated Jan. 9, 2004) (*Hispanic Keys Letter*).¹ Our records reflect that you have not paid the \$43,600.00 total amount at issue here for FY 2003.

In the *Hispanic Keys Letter*, we explained that, in establishing a regulatory fee program, the Commission recognized that in certain instances payment of a regulatory fee may impose an undue financial hardship upon a licensee. The Commission therefore decided to grant waivers or reductions of its regulatory fees in those instances where a "petitioner presents a compelling case of financial hardship." See *Implementation of Section 9 of the Communications Act*, 9 FCC Rcd 5333, 5346 (1994), *recon. granted*, 10 FCC Rcd 12759 (1995). In reviewing a showing of financial hardship, the Commission relies upon a licensee's cash flow, as opposed to the entity's profits, and considers whether the station lacks sufficient funds to pay the regulatory fee and maintain service to the public. Thus, even if a station loses money, any funds paid to principals, deductions for depreciation or similar items are considered funds available to pay the fees.

¹ We note that Hispanic Keys is no longer the licensee of WVEB-CA, WVIB(TV) or WMV-848. Robin Broadcasting Co., LLP, is the licensee of WVEB-CA and Sonia Broadcasting Company, LLC, (Sonia Broadcasting) is the licensee of WVIB(TV) and WMV-848, which is the TV studio transmitter link for WVIB(TV). These changes in licensee status occurred after the FY 2003 regulatory fees were due on September 25, 2003, and therefore do not affect our decision here.

In support of your initial request for waiver on the grounds of financial hardship (dated September 25, 2003), you submitted a copy of Hispanic Keys' 2002 U.S. Income Tax Return for an S Corporation and associated schedules and attachments. We found that those papers showed that although Hispanic Keys reported a financial loss in 2002 of \$128,222.00, the loss resulted from its deductions for depreciation and amortization of \$39,315.00 and \$225,257.00, respectively.² We thus found that Hispanic Keys had sufficient funds from its deductions for depreciation and amortization from which it could pay its FY 2003 regulatory fees. We therefore found that Hispanic Keys had failed to make a compelling showing of financial hardship, and we denied its waiver request.

In your request for reconsideration of the *Hispanic Keys Decision*, you assert that "[a]n examination of [Hispanic Keys'] cash will demonstrate that the station has had losses in the 2002 tax year." You state that Hispanic Keys' 2002 revenues were \$507,156.00. You state that "the income figure as provided in [Hispanic Keys'] income tax return [i.e., \$1,118,786.00] should be adjusted" to deduct \$178,000.00, an amount that "represents a proposed license transfer that did not take place and thus, is classified as non-operating revenue[.]" An additional \$250,000.00 should be deducted from Hispanic Keys' 2002 revenues as representing "a one-time option payment for the purchase of the station[.]" while another \$176,844.00 should be deducted "to reflect a non-recurring amount paid by a programmer[.]" You maintain that "[t]hese types of revenues are determined to be non-repeatable and thus, non-operating revenues." You calculate that "the 2002 revenues adjusted without these items, as well as without amortization and depreciation, are \$507,156." You state that "total operating expenses are . . . [\$564,563.00]; thus, there is a loss of . . . \$57,407.00."

We are not persuaded by your assertion that the information on Hispanic Keys' 2002 tax return submitted in support of the waiver request does not accurately portray its financial condition. For example, without further explanation from the licensee, it is not clear to us why so-called "non-recurring" revenue items should not be included as income for the year in question. We assume that the usual purpose of identifying parts of income as "non-recurring" is to explain fluctuations of income over periods of time or to compare one period's income to another. In assessing a licensee's claim of financial hardship for regulatory fee waiver purposes in a given fiscal year, however, we primarily look to the licensee's cash flow for a single time period as it pertains to the fiscal year in question and the licensee's ability to pay the fee for that year. In any event, we need not resolve these questions because additional information before us is adequate to justify a waiver.

² We noted that the amortization expense was included under other deductions in Hispanic Keys' tax return.

On February 25, 2004, "in support of a full record on the pending [proceeding,]" Robert Lewis Thompson, Esq., current counsel for WVEB-CA, WVIB(TV), and WMV848, submitted a cash flow analysis of Hispanic Keys' operations for January 2003 through August 2003 entitled "HKBC's Cash Flows from Operations (2000-2003)" ("Hispanic Keys Cash Flow Statement").³ The Hispanic Keys Cash Flow Statement reflects that Hispanic Keys suffered a financial loss from January 2003 through August 2003, that was only partially offset by salaries that may have been paid to officers and directors,⁴ and irrespective of depreciation and amortization. We therefore grant your request for a waiver of the regulatory fee for FY 2003.

In sum, the petition for reconsideration that you submitted on behalf of Hispanic Keys does not of itself provide sufficient grounds for a waiver of the regulatory fees because the petition does not explain why Hispanic Keys' revenues should be adjusted to reflect

³ The Hispanic Keys Cash Flow Statement, which also includes a cash flow statement for each of the calendar years 2000 through 2002, as well as an annualized cash flow analysis for calendar year 2003, was originally filed as part of an economic analysis by Alan Pearce, PhD. and Richard Carlson, MBA, dated October 2003 ("Pearce and Carlson Analysis"), in support of a request for waiver of the local television multiple ownership rule under section 73.3555(b)(2) of the Commission's rules, 47 C.F.R. §73.3555(b)(2), on the basis that WVIB(TV) is a "failing station," in connection with an application to assign the license of WVIB(TV) from Hispanic Keys Broadcasting, Inc. to Sonia Broadcasting. One of the criteria for a waiver of the television duopoly rule for a "failing station" is that the financial condition of one of the merging stations is poor. The Commission has stated that "[a] waiver is more likely to be granted where one . . . of the stations has had a negative cash flow for the previous three years[.]" See *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12939 (1999). Commission staff found that Sonia Broadcasting satisfied each of the criteria for a waiver of the duopoly rule on the basis of a "failing station." Staff also found Sonia Broadcasting qualified to be a licensee of WVIB(TV) and granted the assignment application. See *Hispanic Keys Broadcasting, Inc. (Assignor) and Sonia Broadcasting Company, LLC (Assignee) for Consent to the Assignment of License WVIB(TV), Key West, Florida*, 19 FCC Rcd 4603 (Media Bureau; released March 11, 2004) (granting the application to assign the license of WVIB(TV) from Hispanic Keys Broadcasting, Inc. to Sonia Broadcasting); see also *id.* at fn.12 (citing the "Pearce and Carlson Analysis" in support of the grant of the waiver request).


⁴ Because the line item for "Payroll" expenses on the Hispanic Keys Cash Flow Statement does not indicate whether the amount represents payments to principals, we assume just for purpose of this calculation that the payment does represent payments to principals and we therefore consider the amount to be funds available to pay the regulatory fee.

items that you identify as "non-recurring," "non-repeatable," or "non-operating."⁵ On the basis of the record before us, however, including the Hispanic Keys Cash Flow Statement submitted by current counsel for WVEB-CA, WVIB(TV), and WMV848,⁶ we find that Hispanic Keys suffered a financial loss in the period from January 2003 through August 2003, and we grant your request for waiver of the FY 2003 regulatory fees for these stations.

In the initial waiver request, you requested confidential treatment of the material that you submitted with your request for fee relief. Although you do not reassert that request for confidentiality here, because you submit additional financial information in connection with your petition for reconsideration, we reiterate that pursuant to section 0.459(d)(1) of the Commission's rules, 47 C.F.R. §0.459(d)(1), we do not routinely rule on requests for confidential treatment until we receive a request for access to the records. The records are treated confidentially in the meantime. If a request for access to the information submitted in conjunction with your regulatory fee is received, you will be notified and afforded the opportunity to respond at that time.

If you have any questions concerning this matter, please contact the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,



Mark A. Reger
Chief Financial Officer

Copy to:
Robert Lewis Thompson, Esq.
Thiemann Aitken & Vohra, L.L.C.
908 King Street, Suite 300
Alexandria, VA 22314

⁵ In this regard, we note that although the Hispanic Keys Cash Flow Statement makes adjustments to revenue for "non-recurring," "non-repeatable," and "non-operating" items for calendar years 2000 through 2002, the Hispanic Keys Cash Flow Statement indicates in the accompanying explanatory material that there were no such revenue adjustments for the cash flow analysis for the period January 2003 through August 2003. See Pearce and Carlson Analysis, Section 4.4.

⁶ We initially sought additional information from counsel with respect to the supplemental material submitted, which he was unable to provide, but we are now satisfied based on our own further review of the submission that there is sufficient evidence of financial hardship to support a waiver.